

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ANTHONY Q. HOYLE,
Petitioner,

v.

DOUGLAS DRETKE,
Director of the Texas Department
of Criminal Justice - Correctional
Institutions Division,
Respondent.

§
§
§
§
§
§
§
§
§

Civil Action: H-05-0058

MEMORANDUM AND RECOMMENDATION

Petitioner Anthony Q. Hoyle's application for writ of habeas corpus pursuant to 28 U.S.C. § 2241 and 2254 has been referred to this magistrate judge for a report and recommendation (Dkt. 4). Respondent has filed a motion to dismiss (Dkt. 8). The court recommends that respondent's motion to dismiss be granted and Hoyle's application be denied.

BACKGROUND

Hoyle pled guilty and was convicted of the felony offenses of robbery and theft on August 29, 1997 in a Texas state court. Hoyle was sentenced to 10 years on both counts, to run concurrently. His sentence was enhanced based on a prior conviction for aggravated sexual assault. Hoyle did not appeal his conviction.

On September 2, 2003, Hoyle filed a petition for habeas corpus relief in state court challenging his conviction and the calculation of his time-served credit. The Texas Court of Criminal Appeals dismissed Hoyle's writ petition on March 3, 2004. On December 29, 2004,

Hoyle filed this federal writ application asserting ineffective assistance of counsel and a violation of his due process rights.

ANALYSIS

Hoyle's petition, filed after April 24, 1996, is subject to the Anti-terrorism and Effective Death Penalty Act of 1996 ("AEDPA"). *Williams v. Cain*, 125 F.3d 269, 274 (5th Cir. 1997). Section 2244 of the AEDPA provides as follows:

- (d)(1) A 1-year period of limitation shall apply to an application for writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –
 - (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
 - (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
 - (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
 - (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
- (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d).

Hoyle did not appeal his conviction. Under Texas law, a defendant must file a notice of appeal within 30 days after the sentence is imposed. TEX. R. APP. P. 26.2(a). Thus, his statute of limitations for seeking a federal writ of habeas corpus began 30 days after imposition of his sentence, or September 30, 1997, and expired on September 29, 1998.


Hoyle presents no argument or evidence supporting statutory or equitable tolling of the one-year limitations period. Hoyle's state writ application was not filed until after the one-year limitations period ended and could not toll the limitations period. *Scott v. Johnson*, 227 F.3d 260, 263 (5th Cir. 2000). Hoyle's writ application is barred by the one-year limitations period set out in 28 U.S.C. § 2244(d)(1)(A).

CONCLUSION AND RECOMMENDATION

Because Hoyle's petition was not timely filed, the court recommends that Respondent's motion to dismiss (Dkt. 8) be granted, and Hoyle's petition be dismissed with prejudice.

The parties have ten days from service of this Memorandum and Recommendation to file written objections. Failure to file timely objections will preclude appellate review of factual findings or legal conclusions, except for plain error. *See* FED. R. CIV. PRO. 72.

Signed at Houston, Texas on June 7th, 2005.


Stephen Wm Smith
United States Magistrate Judge